NO. 85-1016

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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WILLIAM L. McKNIGHT AND
JAMES W. STURDEVANT, PETITIONERS

V.

UNITED STATES OF AMERICA

---

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Attorneys for Petitioners

## QUESTION PRESENTED FOR REVIEW

Whether the United States District Court for the Western District of Missouri, Western Division, committed error when said Court read into the trial record certain confidential information contained in the Presentencing Investigation Report and caused this report to be sent to third parties, not parties to that or this proceeding, when the disclosure of information contained in the report can only be made after a showing of compelling reasons therefor, and when no such compelling reasons were offered for the disclosure by the Court or by any other person and whether the United States Court of Appeals for the Eighth Circuit committed error by allowing said order and judgment by the District Court to stand.[1]

[1] All parties in the United States Court of Appeals for the Eighth Circuit are listed in the caption.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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WILLIAM L. McKNIGHT AND
JAMES W. STURDEVANT, PETITIONERS

V.

UNITED STATES OF AMERICA

---

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

The Petitioners, William L. McKnight and James W. Sturdevant, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered October 2, 1985.

## OPINIONS BELOW

The judgment of the District Court (Appendix B, infra, PP. 19) was entered on April 27, 1984. A Notice Of Appeal to the Court of Appeals for the Eighth Circuit (Appendix B, infra, P. 22) was filed on May 7, 1984. The Final Decree of the Court of Appeals (Appendix B, infra,

PP. 23) was entered on August 26, 1985, and affirmed the District Court's ruling. Petition For Rehearing En Banc (Appendix B, infra, PP. 33) was filed September 9, 1985. On October 2, 1985, the Court of Appeals issued its Order (Appendix B, infra, P. 45) denying the Motion For Rehearing.

## JURISDICTION

The final decree of the Court of Appeals (Appendix B, infra, PP. 23) was entered on August 26, 1985. On October 2, 1985, the Court of Appeals (Appendix B, infra, P. 45) denied a Petition For Rehearing En Banc. This Petition For Certiorari is being filed within the prescribed period of 60 days after October 2, 1985. The jurisdiction of this court is invoked under 28 U.S.C., Section 1254(i), 26 U.S.C., Section 1651(a), and 28 U.S.C., Section 2106.

## STATUTES

This case involves Rule 32(c) of the Federal Rules of Criminal Procedure, dealing with presentencing investigation reports and disclosures thereof. The text of this statute is set forth in Appendix A, PP. 15.

## STATEMENT OF THE CASE

This appeal is from a final decision of judgment and sentencing in a criminal action before the United States District Court for the Western District of Missouri, pursuant to 28 U.S.C., Section 3231. The course of proceedings and relevant facts are as follows.

On or about March 9, 1984, after waiving prosecution by indictment, petitioners were charged by information of knowingly causing a false statement to be made on a security agreement for the purpose of influencing a federally insured bank to extend a loan to a third party, in violation of 18 U.S.C., Sections 1014 and 2.

On or about that same date of March 9, 1984, the petitioners and the respondents entered into a plea agreement. Thereafter, arraignment was held and petitioners entered pleas of nolo contendere to the charge filed against them. The court, after accepting both the plea agreement and the pleas of nolo contendere, found each of the petitioners guilty and ordered the probation office to conduct a presentence investigation. In compliance with said order, the probation office conducted such an investigation and rendered a presentence investigation report.

The report contained, inter alia, certain information voluntarily supplied by petitioners in confidence during the course of the investigation, including the financial net worth and current financial status of each. The petitioners and respondents were given the opportunity to review the presentence report and it was examined by both parties.

On April 27, 1984, petitioners appeared before the court at the sentencing hearing. During the proceeding, the court summarized the general types of information contained in the presentence report which it had reviewed in aiding its determination of sentence. During this portion of the hearing, the Court made a special point to read into the record that portion of the presentence report pertaining to the petitioners' financial condition. The petitioners objected to the court's action and asked that this information be stricken from the record as being confidential. The court overruled the objection and continued to pronounce sentencing.

The Court fined each petitioner $5,000.00 and imposed upon them a four year probationary term subject to special conditions. One of the conditions was that petitioners pay the minority shareholders of the Bank of

Raymondville their losses resulting from petitioners' actions, such sum to be determined by negotiation or litigation. The court then directed the Clerk of the Court to send a copy of the transcript of the hearing, which included the confidential information contained in the presentence report and read into the record, to each of the minority shareholders of the Bank of Raymondville. Petitioners voiced their objection to the court's ordering the transcript being sent to the minority shareholders on the grounds that the same contained confidential information from the presentence report. These objections were also overruled.

On May 7, 1984, petitioners filed their Notice of Appeal to the Court of Appeals based upon the prejudicial error of the trial court at the sentencing hearing and the resulting provisions of the Judgment and Probation/ Commitment Order.

On May 9, 1984, petitioners filed with the District Court a Motion to Seal the Transcript Pending Appeal, therein requesting the court to seal and prevent the disbursement of the sentencing hearing transcript to the minority shareholders pending appeal in order to prevent irreparable harm to petitioners. Respondents responded

to petitioners' Motion and the court thereafter, on May 18, 1984, entered its written Order denying petitioners' Motion, and further ordered that no sooner than ten days after the date of said Order the Court Clerk should forward copies of the sentencing hearing transcript to the minority shareholders.

On May 24, 1984, petitioners filed with the Court of Appeals a Petition for Writ of Prohibition in case number 84-1670 in an effort to prevent the District Court from sending the sentencing hearing transcript to the minority shareholders in accordance with the Judgment and Probation/Commitment Order and the May 18, 1984, Order while this appeal was pending to prevent irreparable harm to the petitioners. This Court denied the petitioners' Petition on May 29, 1984.

On or about June 31, 1984, the Clerk of the District Court forwarded copies of the transcript of petitioners' sentencing hearing to the minority shareholders.

On or about August 26, 1985, the Court of Appeals filed their opinion in this mater and affirmed the actions of the District Court. On September 9, 1985, petitioners filed their Petition For Rehearing En Banc with the Court

of Appeals. On October 2, 1985, the Court of Appeals denied the petitioners' Petition For Rehearing En Banc.

## REASONS FOR GRANTING THE WRIT

While this case is of great importance to petitioners in that William L. McKnight and James W. Sturdevant have been required by the District Court below to negotiate a reparation settlement with the minority shareholders but have been placed at a disadvantaged and substantially inferior negotiating position by the disclosure to said shareholders by said District Court of certain confidential financial information contained in a presentence investigation report, yet there are other matters involved which are more important. First, the integrity of the court system, as well as the effectiveness and usefulness of the presentence investigation report is seriously undermined by the lower court's holdings; and, second, the district court and appellate courts below have held in contradiction of other United States Court of Appeals holdings.

## THE DECISION BELOW PRESENTS AN IMPORTANT FEDERAL QUESTION WITH SIGNIFICANT IMPACT ON THE USE OF PRESENTENCE INVESTIGATIVE REPORTS

The opinion of the Eighth Circuit Court of Appeals jeopardizes the integrity of the presentence report. In

United States vs. Charmer Industries, 711 F.2d 1164 (2nd Cir. 1983) the trial court ordered a presentence investigation report on the defendant before sentencing took place. The presentence report thusly compiled contained information which was originally found on a plea memorandum filed in the case. A third party sought disclosure of the presentencing report but was denied by the Second Circuit Court of Appeals. That Court stated that first, nearly all the pertinent information sought was on the plea memorandum, a public document by virtue of its filing in the case, and second that no compelling need for such disclosure had been shown. The Charmer court stated that "A compelling need to further the ends of justice" need be shown to allow disclosure of the confidential information contained in the presentence investigation report.

By allowing a third party to obtain this normally confidential, and confidentially supplied, information the United States Court of Appeals for the Eighth Circuit is jeopardizing the integrity of the court system, and is damaging the effectiveness of the presentence investigation report. Ordinarily, the person compiling the presentencing investigation report is able to obtain infor-

mation from the defendants themselves, otherwise not available, to aid the court in issuing sentence. However, if the information is not to be kept confidential, but rather is to be used in ways prejudicial to the rights of the defendants not relating to the crime for which sentencing is occurring, defendants will be reluctant to furnish such confidential information and the court will not have it for consideration. Because the report is intended to remain confidential, and is to be utilized for purposes of sentencing only, defendants are willing to provide the necessary information. If the courts begin to utilize the reports, and information contained only in the reports for purposes other than to hand down proper sentence, the defendants in said cases will begin to be uncooperative for fear of extended use of the information given.

To ensure the availability of as much information as possible from all types of sources to assist in sentencing, the courts have prevalently determined that presentencing reports are confidential. United States v. Greathouse, 484 F.2d 805 (7th Cir. 1973). In affirming a refusal to disclose to a criminal defendant the presentence report on a co-defendant who testified against her, the court in Greathouse stated:

> "Presentence reports warrant special treatment. As other courts have held, requiring disclosure of a presentence report is contrary to the public interest as it would adversely affect the sentencing court's ability to obtain data on a confidential basis from the accused and from sources independent of the accused for use in the sentencing process. United States v. Evans, 454 F.2d 813, 820 (8th Cir. 1972), cert. denied. 406 U.S. 969 (1972). Rule 32(c)(2) of the Federal Rules of Criminal Procedure.

The Evans court also made note of the fact that the defendant for whom the report was compiled did not give his consent to the publication of any material contained in the report. Not only did the petitioners in this matter not consent, but they objected to such disclosure.

By allowing the Judge of the District Court to utilize the information contained in the presentence report in a manner other than to sentence, the effectiveness and integrity of the report is placed in serious jeopardy.

## THE DECISION BELOW CONFLICTS WITH ALL RELEVANT PRIOR JUDICIAL INTERPRETATION OF RULE 32(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE WHEN IT ALLOWED THE TRIAL COURT TO DISCLOSE TO THIRD PERSONS CONFIDENTIAL MATERIAL CONTAINED WITHIN THE PRESENTENCE INVESTIGATION REPORT

Here, as in United States v. Charmer Industries, 711 F.2d 1164 (2nd Cir. 1983), United States v. Evans, 454

F.2d 813 (8th Cir. 1972), cert denied. 406 U.S. 962 (1972), and United States v. Figurski, 545 F.2d 389 (4th Cir. 1976), there is squarely raised the issue of whether confidential information contained within a presentence investigation report can be disclosed without a showing of a compelling need for such disclosure. The Second, Fourth and Seventh Circuits have all answered this query in the negative.

Rule 17.1(a) of the Rules of the Supreme Court provides that "When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter," the jurisdiction of this court on a writ of certiorari may be properly invoked.

The Second, Fourth and Seventh Circuits have all stated that without a showing of compelling need and/or consent of the defendant for whom the report was compiled, there can be no disclosure of the confidential information contained in said report. The District Court sua sponte, directed the publication of the confidential information contained in the reports. There was no movant, except the court itself, there was no showing of any compelling need, and there was no consent by the defendants. In fact, the Judge of the District Court

ordered the dissemination of the information over the objections of the Defendants.

There is clearly presented in this case a conflict between holdings of the various courts of appeals. While several courts have determined that the history of Rule 32(c)(3)(d) of the Federal Rules of Criminal Procedure indicates a "long standing judicial view that confidentiality should be maintained," Charmer, 711 F.2d 1172, the Eighth Circuit Court of Appeals has ignored this, and affirmed the direction of the District Court to provide the confidential information to third parties. The Supreme Court should exercise its power of supervision in order to maintain the continuity, the uniformity, and the integrity of the court system.

## CONCLUSION

The impact of the decision and opinion of the Court of Appeals for the Eighth District goes far beyond that harm to the petitioners arising from said decision. The impact extends to every criminal case tried in the Eighth Circuit for under the opinion issued by the Court of Appeals for the Eighth Circuit a court may circumvent the requirements of confidentiality of Rule 32(c) and may

direct otherwise confidential information to whomever said court wishes to receive it.

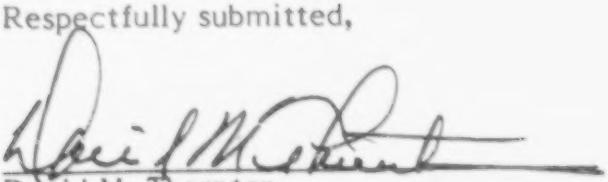
The impact of that decision goes even farther than a breach of confidence but will in effect undermine the integrity and effectiveness of the presentence report. If the information contained in the report is to be made public then defendants and independent sources will be reluctant to disclose confidential information. This lack of information will diminish the importance the sentencing court can place upon the report and hence will diminish the courts' ability to properly sentence.

The decision and opinion of the Court of Appeals for the Eighth District in this matter is clearly in conflict with a host of other decisions in other circuits and if permitted to stand will inflict a large degree of confusion into the formerly settled area of the confidentiality of the presentence report.

For these reasons, petitioners respectfully pray that a Writ of Certiorari should issue to review the

judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

By: 

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November 29, 1985

## APPENDIX A

## STATUTORY PROVISIONS INVOLVED
## FEDERAL RULES OF CRIMINAL PROCEDURE
## RULE 32(C)

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

(3) Disclosure.

(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

(D) Any copies of the presentence investigation report made available to the defendant or his counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion, otherwise directs.

(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Youth Correction Division of the Board of Parole pursuant to 18 U.S.C. Sections 4208(b), 4252, 5010(e), or 5034 shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

## APPENDIX B

## THE DECISIONS BELOW

Here are set forth, successively, the Judgment and Probation/Commitment Order of the United States District Court for the Western District of Missouri, Western Division; the Notice of Appeal by your Petitioners fromthat judgment and order; the Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit; your Petitioners' Petition For Rehearing En Banc by the United States Court of Appeals for the Eighth Circuit; and the Order by the United States Court of Appeals for the Eighth Circuit denying the Petition for Rehearing.

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
Docket No. 84-00049-01/02/CR-W-8

United States of America vs.

DEFENDANT William L. McKnight
James W. Sturdevant

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on APRIL 27, 1984

COUNSEL WITH COUNSEL, David M. Thornton and Will Pollard

PLEA NOLO CONTENDERE

FINDINGS & JUDGMENT There being findings of GUILTY as to each defendant.

Defendants have been convicted as charged of the offense(s) of knowingly causing to be made a materially false statement on a security agreement for the purpose of influencing the action of a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, in violation of 18 U.S.C., Sections 1014 and 2, as charged in an information in one count.

SENTENCE OR PROBATION ORDER The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The

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| | defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of<br><br>See Attachment A |
| SPECIAL CONDITIONS OF PROBATION | See Attachment A |
| ADDITIONAL CONDITIONS OF PROBATION | In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side (Attachment A) of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period. |
| COMMITMENT RECOMMENDATION | Not applicable. |
| SIGNED BY: | U. S. District Judge Joseph E. Stevens, Jr. |
| DATE: | 4/27/84 |

ATTACHMENT A
TO
ADDENDUM

Criminal Action No. 84-00049-01/02-CR-W-8

United States of America
v.
William L. McKnight
James W. Sturdevant

It is the judgment of the court that each defendant be fined $5,000.00 and that imposition of sentence to confinement is suspended and each defendant is placed on probation for a period of 4 years. It shall be a condition of probation that each defendant perform 150 hours of community service under the supervision of the U.S. Probation and Parole Office. It shall be a further condition of probation that the fine assessed against each defendant be paid within 6 months of this date.

It shall be an additional condition of this probation that William L. McKnight or James W. Sturdevant, either individually or jointly, either with or without agreement between the two of them, shall pay to the minority shareholders of the Bank of Raymondville in Raymondville, Missouri, as of January 11, 1981, such amounts as it can be agreed said minority shareholders lost by reason of these defendants' actions, or, if not agreed then such amounts as are determined due any minority shareholder for the same reason by judicial action. The court understands those minority to be the following persons: Jim and LaVesta Brallier; E. L. Daughterty; Ethel M. Dunn; J. K. and J. M. Forinash; James W. and Waneda Forinash; Kathleen M. Fiquest; Bessie K. Harrington; Lilly Hobbs; Fern Kirkpatrick; Sylvia White; Helen Wilson; and William L. McKnight, II.

The U. S. Attorney is directed to verify the accuracy of this list and to notify the court within 30 days if it should be amended. The Clerk of this court is directed to send a copy of the transcript of this sentence to each of those shareholders listed in the presentence investigation report and to such others as may be added by the report from the United States Attorney ordered this date.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

(Sturdevant) Docket No. 84-00049-02-CR-W-8
(McKnight) Docket No. 84-00049-01-CR-W-8

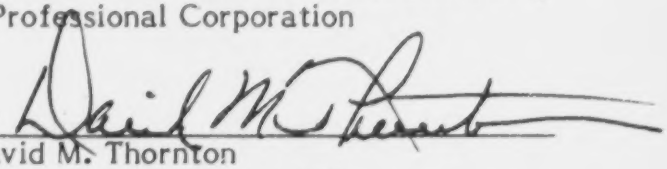
UNITED STATES

v.

| | | |
|---|---|---|
| William L. McKnight | ) | |
| | ) | |
| and | ) | NOTICE OF APPEAL |
| | ) | |
| James W. Sturdevant | ) | |

Notice is hereby given that William L. McKnight and James W. Sturdevant, defendants above named, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the Judgment and Probation/ Commitment Order entered in this action on the 27th day of April, 1984.

THORNTON, WAGNER & THORNTON,
a Professional Corporation

By 
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Attorneys for Defendants

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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No. 84-1606

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| | | |
|---|---|---|
| United States, | * | |
| | * | |
| Appellee, | * | |
| | * | Appeal from the United States |
| v. | * | District Court for the |
| | * | Western District of Missouri. |
| William L. McKnight | * | |
| and | * | |
| James W. Sturdevant, | * | |
| | * | |
| Appellants. | * | |

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Submitted: June 12, 1985

Filed: August 26, 1985

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Before HEANEY, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BOWMAN, Circuit Judge.

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FLOYD R. GIBSON, Senior Circuit Judge.

The defendants, William McKnight and James Sturdevant, appeal from the district court's[1] denial of

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[1] The Honorable Joseph E. Stevens, Jr., United States District Court for the Western District of Missouri.

their motion to strike information entered onto the record of a sentencing hearing, and from the district court's order to deliver copies of the hearing transcript to certain individuals. We affirm.

I. Facts

Pursuant to a plea agreement with the government, the defendants entered pleas of nolo contendere to one count of causing a materially false statement to be made on a loan application submitted to a bank insured by the Federal Deposit Insurance Corporation. 18 U.S.C. Section 1014 (1982)[2]. The district court accepted the defendants' pleas and ordered a presentence investigation report. While reviewing the report during the sentencing hearing, the district judge read into the record the net worth of each defendant, as stated in the report. The defendants objected to this statement on the basis that

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2 18 U.S.C. Section 1014 (1982) provides in pertinent part as follows: "Whoever knowingly makes any false statement *** for the purpose of influencing in any way *** any bank the deposits of which are insured by the Federal Deposit Insurance Corporation *** upon any application *** or loan *** shall be fined not more than $5,000 or imprisoned not more than two years or both."

they had revealed their net worth in confidence, and asked the court to strike the statement from the record. The district court overruled the objection.

The district court fined each of the defendants $5,000 and placed them both on probation for four years. One of the conditions of probation required that the defendants:

> either individually or jointly, either with or without agreement between the two of them, shall pay to the minority shareholders of the Bank of Raymondville *** such amounts as it can be agreed such minority shareholders lost by reason of defendants' actions, or, if not agreed, then such amounts as are determined due any minority shareholder for the same reason by judicial action.

In order to effectuate this condition, the district court directed the clerk of the court to forward copies of the transcript of the sentencing hearing to the minority shareholders. The district court overruled the defendants' objection to this order.

II. Discussion

At the threshold we must determine whether we have jurisdiction to rule on the merits of this appeal. The government argues that a defendant must file a motion to correct or reduce a sentence before the defendant can

appeal from the sentence imposed. Fed. R. Crim. P. 35.[3] We disagree.

A sentence of probation is a "final decision" for purposes of appellate review. Korematsu v. United States, 319 U.S. 432, 433, 436 (1943). Appellate courts, including this one, which have considered the question appear to treat review of a sentence on direct appeal, rather than on collateral appeal from the denial of a Rule 35 motion, as a matter of discretion. See United States v. Mastrangelo, 733 F.2d 793, 800 n.4 (11th Cir. 1984); United States v. Prescon Corp., 695 F.2d 1236, 1241 (10th Cir. 1982); United States v. Gilliss, 645 F.2d 1269, 1284 n. 35 (8th Cir. 1981) (quoting United States v. Mathis, 579 F.2d 415, 420 (7th Cir. 1978); United States v. Rosenbarger, 536 F.2d 715, 722 (6th Cir. 1976); cert. denied, 431 U.S. 965 (1977). But see United States v. Horton, 646 F.2d 181, 189 (5th Cir.) (declining to review the legality of a sentence before trial court had been

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[3] Fed. R. Crim. P. 35 provides in pertinent part as follows: "The court may correct *** a sentence imposed in an illegal manner within the time provided *** for reduction of sentence *** (which is) 120 days after the sentence is imposed ****"

presented with a Rule 35 motion), cert. denied, 454 U.S. 970 (1981); United States v. Resnick, 483 F.2d 354, 358-59 (5th Cir.) (declining to review legality of a sentence before trial court had been presented with a Rule 35 motion) cert. denied, 414 U.S. 1008 (1973). Thus, we choose to review this sentence.

During the sentencing hearing, the district court read into the record the net worth of each defendant. The defendants argue that such an action is impermissible. We disagree.

The circumstances under which presentence investigation reports are to be made, their content, and the circumstances under which they may be disclosed, are governed by Rule 32 of the Federal Rules of Criminal Procedure. The Rule is silent regarding the disclosure of such reports to third persons. United States v. Charmer, 711 F.2d 1164, 1173 (2d Cir. 1983); United States v. Figurski, 545 F.2d 389, 391 (4th Cir. 1976); see also Fed.R.Crim.P. 32. In order to ensure the free flow of information so that a district court has as complete a set of facts as is possible for fashioning an appropriate

sentence, Charmer, 711 F.2d at 1170, 1176; United States v. Dingle, 546 F.2d 1378, 1381 (10th Cir. 1976); United States v. Greathouse, 484 F.2d 805, 807 (7th Cir. 1973); United States v. Evans, 454 F.2d 813, 820 (8th Cir.), cert. denied, 406 U.S. 969 (1972), courts have held that presentence reports are not public and should not be disclosed to third persons absent a demonstration that disclosure is required to meet the ends of justice. Charmer, 711 F.2d at 1176; Figurski, 545 F.2d at 391 (quoting Hancock Bros., Inc. v. Jones, 293 F. Supp. 1229, 1233 (N.D. Cal. 1968)). The American Bar Association also recommends that presentence reports be maintained as confidential documents, limiting their disclosure, as to third parties, to persons or agencies dealing with defendant's rehabilitation. A.B.A. Sentencing Alternatives and Procedures Section 18 (1979).

However, we are not presented with the disclosure of a presentence report to a third person. Rather, we are confronted with the propriety of disclosing facts contained in the report, and placed on the court record upon which the district court based its sentencing decision. We think that disclosure of such facts during a sentencing hearing is appropriate particularly when, as here, the

district court disclosed the facts for the purpose of verifying their accuracy before imposing sentence, and then utilized these facts in fashioning a procedure for restitution. Indeed, it appears that often there is a colloquy between a criminal defendant, counsel, and the sentencing judge, regarding facts contained in a pre-sentence report, during a sentencing hearing. See, e.g., United States v. Tucker, 404 U.S. 443, 444 (1972); United States v. Grugette, 678 F.2d 600, 603, 603 n.8 (5th Cir. 1982); United States v. Wondrack, 578 F.2d 808, 810 (9th Cir. 1978); United States v. Sneath, 557 F.2d 149, 150 (8th Cir. 1977). In addition, Rule 32 itself allows for the disclosure in open court of the facts to be relied on in sentencing, under certain circumstances.[4]

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[4] Fed.R.Crim.P. 32(c)(3)(B) provides in pertinent part:

> If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this Rule, the court in lieu of making the report *** available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.
>
> (emphasis added).

The defendants argue that they revealed this information under a promise of confidentiality. We have reviewed each of the presentence investigation reports in camera, and there is no indication in either report that this information was to be kept confidential. The defendants argue, in essence, that disclosure of this information may result in their liability to the full extent of the losses suffered by the minority shareholders as a result of the defendants' actions, and thus is prejudicial. We simply cannot discern the prejudice to the defendants, and hold that the district court's recital, for the record, of the salient fact upon which it based its sentencing decision was appropriate. The sentence of probation was not imposed in an illegal manner, and is affirmed. We likewise uphold the district court's order to distribute a transcript of the sentencing hearing to each of the minority shareholders in order to effectuate the conditions of the defendants' sentences. Generally, presentence reports are considered as confidential reports to the court and are not considered public records, except to the extent that they or portions of them are placed on the court record or authorized for disclosure to serve the interests of justice. As noted in Charmer, 711 F.2d at

1176, "(t)he report may not properly be disclosed without authorization of the court." Any disclosure authorized by the court posits the issue of whether or not the court has abused its discretion in authorizing it. We find no abuse of discretion here.

As a condition of probation, the district court required that the defendants:

> either individually or jointly, either with or without agreement between the two of them, shall pay to the minority shareholders *** such amounts as it can be agreed such minority shareholders lost by reason of these defendants' actions, or, if not agreed, then such amounts as are determined due any minority shareholder for the same reason by judicial action.

The defendants argue that the district court erred by failing to specify that they are liable only for those losses which resulted from the act for which they were convicted and sentenced.

While the district court could have been more specific, we hold that this condition of probation is not prejudicially vague. It is clear that reparation, as a condition of probation, may only be ordered for the actual damages flowing from the specific crime for which a defendant is convicted. United States v. Missouri Valley

Constr. Co., 741 F.2d 1542, 1547-48 (8th Cir. 1984) (overruling United States v. William Anderson Co. Inc., 698 F.2d 911 (8th Cir. 1982)); United States v. Seest, 631 F.2d 107, 110 (8th Cir. 1980); Gross v. United States, 228 F.2d 612, 615 (8th Cir. 1956). Thus, as is implicit in the district court's order, the defendants' sentences require them only to make reparation to the minority shareholders for the loss they suffered as a direct result of the crime for which the defendants were convicted and sentenced.

Affirmed.

A true copy.

ATTEST:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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NO. 84-1606-WM

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UNITED STATES OF AMERICA,
APPELLEE

v.

WILLIAM L. McKNIGHT AND
JAMES W. STURDEVANT,
APPELLANTS

---

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

---

# APPELLANTS' PETITION FOR REHEARING IN BANC

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Attorneys for Appellants

FILED: SEPTEMBER 9, 1985

## INTRODUCTION

Now come the Appellants, William L. McKnight and James Sturdevant, and respectfully petition for rehearing in banc of the Court's decision of August 26, 1985, which affirmed the District Court's ruling that decided the Appellants' Motion to strike information entered onto the record of a sentencing hearing and from the District Court's order requiring the court clerk to deliver copies of the hearing transcript to certain individuals.

This Petition is based on the following points:

1. The decision of this Court has no precedent. It is the first decision which authorized and approved a district court in disclosing, sua sponte, either, in whole or in part, a presentence report to the public and third parties, i.e., in this instance - minority shareholders. Fed. R. Crim. P. 32 does not authorize such action.

2. This Court has confused the meaning of utilization of the presentence report with the disclosure of the presentence report. The Appellants have never contended that the district court could not utilize the report but have only contended that it could not disclose the report itself or the information contained therein except under a compelling reason and upon a

demonstration that disclosure is required to meet the ends of justice.

3. The confidentiality of a presentence report is not created by an agreement between the defendant and the government but is inherent in Rule 32 itself. This is no more evident than in all decisions dealing with Fed. R. Crim. P. 32 (C)(3)(B).

4. The action of the district court sua sponte in disclosing in the record the net worth of the Appellants and requiring that the record be sent to third parties, i.e., minority shareholders, was prejudicial to the Appellants in that such information would not be discoverable or admissible in a civil action between Appellants and such third parties; placed the Appellants in a highly disadvantageous position in negotiating with the third parties; and, lastly it was not required for restitution. As to the latter, the district court itself admitted it was not ordering restitution. As stated by the district court: "No, if the part of the statute that you are referring to were applicable the Court could order restitution. I am not ordering restitution." This case does not fall within the statute requiring restitution.

## ARGUMENT

### I. THE DECISION OF THIS COURT HAS NO PRECEDENT.

Fed. R. Crim. P. 32 does not authorize the disclosure of the presentence report in whole or in part.

None of the decisional law dealing with Fed. R. Crim. P. 32 authorized or approves a district court to disclose, sua sponte, in whole or in part the presentence report to third parties.

The presentence report is not public and is confidential and should not be disclosed to third persons absent a demonstration that disclosure is required to meet the ends of justice. (emphasis supplied.)

The principal function of a presentence report is to assist the court in determining the appropriate sentence.

All of the foregoing pronouncements have been made, in one form or another, in the following leading decisions:

United States v. Charmer, 711 F.2d 1164 (2nd Cir. 1983);

United States v. Greathouse, 484 F.2d 805 (7th Cir. 1973);

Hancock Bros., Inc. v. Jones, 293 F. Supp. 1229 (N.D. Cal. 1968);

United States v. Figurski, 545 F.2d 389 (4th Cir. 1976);

United States v. Dingle, 546 F.2d 1378 (10th Cir. 19176);

United States v. Evans, 454 F.2d 813 (8th Cir. 1972), cert. denied, 406 U.S. 969 (1972).

The decision even flies in the face of a previous decision by this Court, Evans. In Greathouse the Court in citing Evans, stated:

> Presentence reports warrant special treatment. As other courts have held, requiring disclosure of a presentence report is contrary to the public interest as it would adversely affect the sentencing court's ability to obtain data on a confidential basis from the accused and from sources independent of the accused for use in the sentencing process.

Again in Evans this Court, in dealing with the claimed right of an accused in a criminal case to obtain a presentence report concerning another person stated:

> Such a claimed right is contrary to public interest ...
> This is specially true where the person who is the subject of the presentence report has not consented to its being given to another person for the other person's use in a public trial.
> ...
> We note that Chandler had neither been asked nor had he given consent to its production. Under such circumstances we deem it to be contrary to public interest for a third person to be entitled as a matter of right to have it or any of its preliminary data produced in connection with a public trial. (emphasis supplied)

The Court cannot justify establishing a precedent, that is not supported by the Fed. R. Crim. P. 32 nor by previous decisions, with the asinine statement that:

> "However we are not presented with the disclosure of a presentence report to a third person. Rather, we are confronted with the propriety of disclosing facts contained in the report, ..."

This rationale is a distinction without a difference. Confidentiality pertains to all and every part of the report and should not be circumvented by such defective reasoning.

Thus under Rule 32 and under the prevailing decisions there is absolutely no support for the action of the district court in, sua sponte, disclosing any part or all of the presentence report.

### 2. UTILIZATION OF THE PRESENTENCE REPORT IS PROPER -- DISCLOSURE IS NOT.

Appellants, in appealing the decision of the district court have never questioned the right of the district court to utilize all or any part of the presentence report in imposing sentence on the Appellants. The Appellants, however, have strenuously objected to the district court in disclosing their net worth to third parties. Such disclosure was absolutely unnecessary in reaching an appropriate sentence. There was no request filed for the disclosure of such information. The district court volun-

tarily disclosed the information. There was no showing of a compelling reason for lifting of confidentiality. The court was aware that Appellants could have reviewed the report and found it to be accurate. The district court could have confirmed this without disclosing Appellants' net worth by asking counsel if they had any objections to it. Thus the disclosure of Appellants' net worth was error. There was no movant, there was no showing of a compelling reason, and there was no showing that disclosure was required to meet the ends of justice.

### 3. CONFIDENTIALITY IS INHERENT IN FED. R. CRIM. P. 32

An agreement between the accused and the government is not necessary to establish confidentiality. Confidentiality is inherent in Fed. R. Crim. P. 32 and has been so found by the decisions interpreting Rule 32. This Court apparently is holding, in affirming the district court, that an agreement is necessary between the Appellants and the government to treat as confidential all information in a presentence report. This Court states:

> "The defendants argue that they revealed this information under a promise of confidentiality. We have reviewed each of the presentence reports in camera and there is

> no indication in either report that this information was to be kept confidential."

Following this statement to its logical conclusion, it would seem this Court is saying that if a promise of confidentiality was made the disclosure would be improper. However, this is simply irrelevant to the issue at hand. It is substantial departure from Evans. Evans impliedly requires the consent of the defendant before the report can be made public or used by a third party. Rule 32 is pregnant with the idea of confidentiality and every case involving Rule 32 and presentence reports confirm this. None of the language in Rule 32 or in the decisions pertaining thereto mention that an agreement for confidentiality is a condition precedent to a presentence report being confidential. Even this Court recognized that confidentiality is inherent in Rule 32 and the relevant decisions when it states:

> "We have reviewed each of the presentence investigation reports in camera ..."

If these reports and the information contained therein are not confidential, why the examination IN CAMERA?

4. DISCLOSURE WAS PREJUDICIAL TO APPELLANTS

We find difficulty in agreeing with this Court when it states "...the district court's recital, for the record, of

the salient fact upon which it based its sentencing decision was appropriate." The disclosure of the net worth was superfluous to the sentence imposed as well as to the condition of probation that Appellants must pay to minority shareholders such amounts they lost as determined either by agreement or by judicial action except it placed Appellants in a highly disadvantageous position in attempting to negotiate a settlement with the third party minority shareholders. This type of condition might be appropriate in restitution cases but this is and was not a restitution case as was so admitted by the district court which stated: "No, if the part of the statute that you are referring to were applicable the Court could order restitution. I am not ordering restitution." Neither was it a case for the application of the Victim and Witness Protection Act of 1982, 18 U.S.C., Sections 3579 and 3580.

The disclosure of the net worth also made available to the minority shareholders information that would not be discoverable or admissible in a civil action for compensatory damages between the Appellants and minority shareholders and in addition made information available to them even before it would have been determined that they were entitled to exemplary damages.

All of the foregoing resulted in prejudice to the Appellants and was not warranted under the facts of this case.

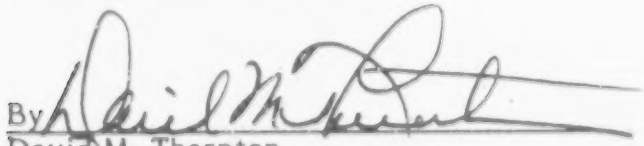
## CONCLUSION

Although reversal of the district court's action cannot remove the information improperly disclosed from the minds of the third parties, it can correct a bad precedent -- one which has no basis in Rule 32 or in the decisional law interpreting such Rule. The inability to erase the information from the minds of the third parties is not the fault of the Appellants but rests upon the district court which denied Appellants' motion to suppress and upon this Court which denied Appellants' motion for writ of prohibition.

Dated September 6, 1985.

Respectfully submitted,

THORNTON, WAGNER & THORNTON,
a Professional Corporation



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Attorneys for Appellants

CERTIFICATE OF SERVICE

I, David M. Thornton, hereby do certify that on this date, September 6, 1985, two (2) true and correct copies of the foregoing Appellants' Petition For Rehearing In Banc was mailed to counsel of record for Plaintiff/ Appellee, U. S. Attorney, John Osgood, 549 U. S. Courthouse, 811 Grand Avenue, Kansas City, Missouri 64106; and, a copy to co-counsel for Defendants/ Appellants, Wilbur L. Pollard, Norton & Pollard, Inc., 3805 North Oak Trafficway, Suite F, Kansas City, Missouri 64116, by depositing same in the U. S. Mail with proper postage thereon, fully prepaid.

David M. Thornton

I express a belief, based on a reasoned and studied professional judgment, that the decision is contrary to the following decision of the United States Court of Appeals for the Eighth Circuit: United States v. Evans, 454 F.2d 813 (8th Cir. 1972), cert. denied, 406 U.S. 969 (1972), as well as the other following cases: United States v. Charmer, 711 F.2d 1164 (2nd Cir. 1983); United States v. Greathouse, 484 F.2d 805 (7th Cir. 1973); Hancock Bros., Inc. v. Jones, 293 F. Supp. 1229 (N.D. Cal. 1968); United States v. Figurski, 545 F.2d 389 (4th Cir. 1976); United

States v. Dingle, 546 F.2d 1378 (10th Cir. 19176); and, that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court: United States v. Evans, 454 F.2d 813 (8th Cir. 1972), cert. denied, 406 U.S. 969 (1972).

I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following question of exceptional importance: Does the district court, sua sponte, have the power to disclose, either in whole or in part, a presentence report to the public and/or third parties?

David M. Thornton
Attorney of record for Appellants

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 84-1606-WM

| | | |
|---|---|---|
| United States of America, | * | |
| Appellee, | * | |
| v. | * | Appeal from the United States District Court for the Western District of Missouri. |
| William L. McKnight et al., | * | |
| Appellants. | * | |

Petition for rehearing en banc filed by appellants has been considered by the Court and is denied.

Petitions for rehearing by the panel filed by appellants and appellee are denied.

October 2, 1985